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No. 424

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955.

HOWARD O. ALLEN,
Petitioner,

vs.

THE STATE OF OHIO,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO.

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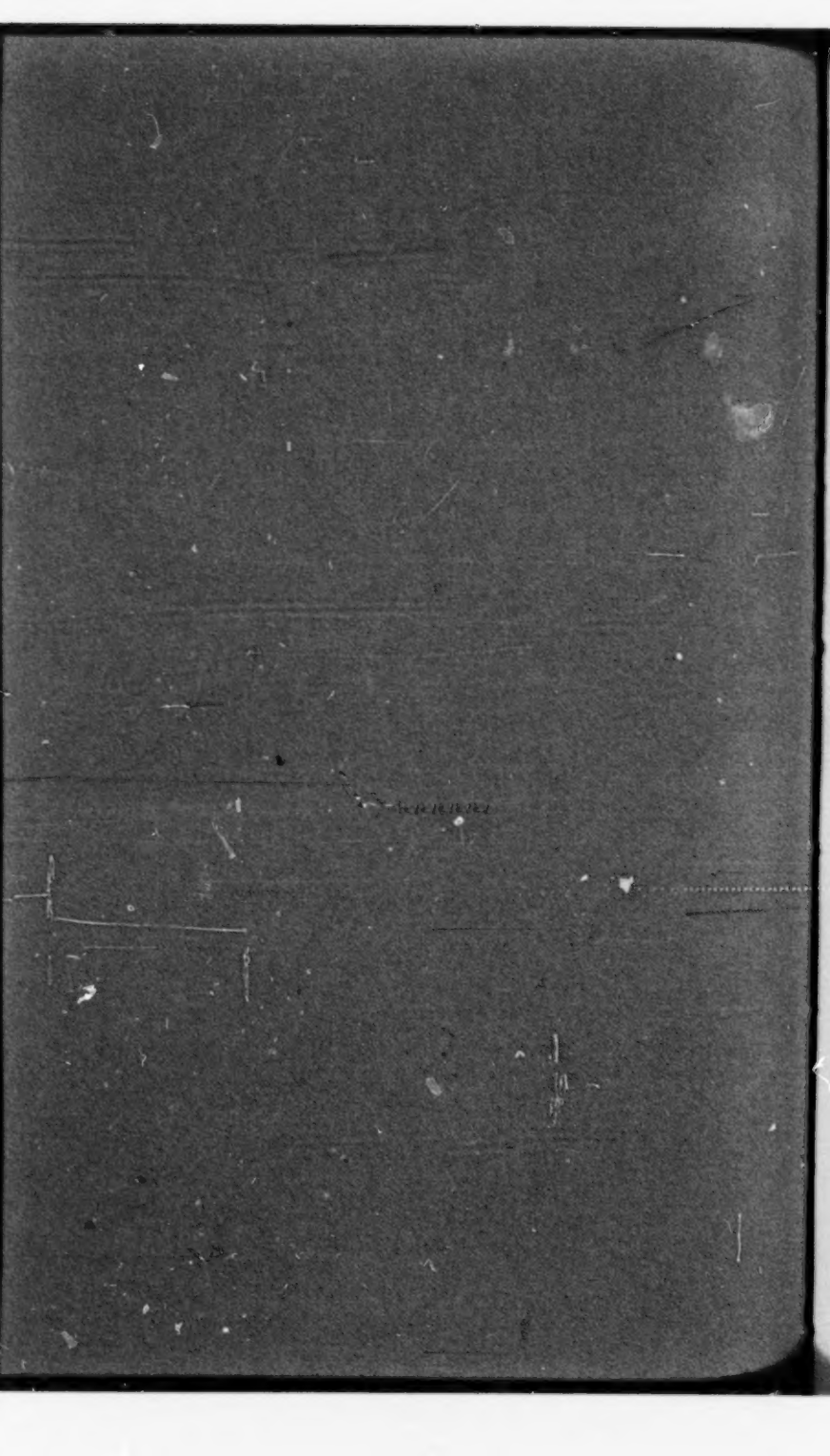

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Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Ohio in the above entitled case on eighth day of June, 1955. The Supreme Court of Ohio refused application for rehearing on June 29, 1955.

OPINION BELOW.

Neither the Common Pleas Court of Summit county, Ohio, before whom the above cause was tried, nor the Court of Appeals of the Ninth Judicial District of Ohio, before whom the judgment of the Common Pleas Court was appealed, nor the Supreme Court of Ohio, wrote an opinion in said cause.

This case was tried in the Common Pleas Court of Summit county after the defendant waived a jury. The trial court after overruling a demurrer to the indictment, found the defendant guilty on the tenth day of May, 1954. The Court of Appeals of the Ninth Judicial District (Summit county, Ohio) affirmed the judgment of the lower court on the fourth day of April, 1955. Motion for leave to appeal was filed in the Supreme Court of Ohio. Said motion was denied on the eighth day of June, 1955. Application for rehearing was filed. The Supreme Court considered and refused the same on June 29, 1955.

JURISDICTION.

At every stage of the proceedings petitioner has asserted rights conferred by the Constitution of the state of Ohio, Article 1, Section 2 and Article 2, Section 26, and the United States Constitution, Amendments 5 and 14, Section 1, as hereinafter set forth in the statement. The judgment of the Supreme Court of Ohio rests upon (1) an interpretation of the United States Constitution, Amendments 5 and 14, Section 1; (2) by said judgment petitioner is denied of rights conferred by said Amendments 5 and 14, Section 1 to the United States Constitution, as well as to the rights conferred by Article 1, Section 2 and Article 2, Section 26 of the Ohio Constitution. The jurisdiction of this court is invoked under Title 28 of the United States Code, Section 1157(3).

QUESTION PRESENTED.

I.

A. Does the General Code of Ohio Section 13042 make the act of fellatio an included criminal offense where the language of said section prohibits only the commission of sodomy?

B. Is the petitioner denied of rights conferred by Article 1, Section 2 and Article 2, Section 26 of the Ohio Constitution, and rights conferred by the Fifth Amendment and the Fourteenth Amendment, Section 1 of the United States Constitution, when petitioner is prosecuted for alleged violation of General Code of Ohio Section 13043, which penalizes only one of two joint offenders and absolves the other, even though the very nature of the offense necessitates the joint participation of both offenders?

STATUTE OF OHIO INVOLVED.

General Code of Ohio, Section 13043.

Whoever has carnal copulation with a beast, or in any opening of the body, except sexual parts, with another human being, shall be guilty of sodomy and shall be imprisoned in the penitentiary not more than twenty years.

On October 1, 1953, the above section became Section 2905.44 of the Revised Code of Ohio, and is as follows:

No person shall have carnal copulation with a beast, or in any opening of the body, except sexual parts, with another human being. Whoever violates this section is guilty of sodomy and shall be imprisoned not less than one nor more than twenty years.

General Code of Ohio, Section 10241 (Revised Code 1.11).

Remedial laws * * * The rule of the common law that statutes in derogation of the common law must be strictly construed has no application to remedial laws; but this section does not require a liberal construction of laws affecting personal liberty relating to amercement or of a penal nature.

United States Constitution, Amendment 5.

No person shall be held to answer for a capital or other infamous crime unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger; nor shall any person be subject, for the same offense, to be twice put in jeopardy of life or limb; nor shall be compelled, in any criminal case, to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Amendment 14, Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside.

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT.

The petitioner was indicted by the grand jury of Summit county on the fifteenth day of October, 1953. The indictment contained one count based on Ohio General Code 13043, and alleged in substance that the petitioner on the thirteenth day of April, 1953, did unlawfully have carnal copulation against nature with a female child, to wit: Sharon Allen, age 9 years, in an opening of the body other than a sexual part of said child, to wit: the mouth.

The petitioner filed a motion to quash the indictment in the Common Pleas Court on the ground that the indictment did not state an offense, and was unconstitutional. Said motion and demurrer were both argued before the trial court and were both overruled.

The petitioner waived a jury and was tried by the trial court on the tenth day of May, 1954. At the very inception of the trial the petitioner objected to the introduction of evidence, on the ground the General Code Section 13043, under which the petitioner was indicted, was unconstitutional and for the further reason the act which the indictment charged the petitioner of having committed, constitutes the act of fellatio and is not prohibited by the sodomy Section 13043 of the Ohio General Code, or any other section of the criminal code of Ohio, and that said section was in violation of the state and federal constitutions. The court overruled the objection.

After the trial, the court rendered its verdict and entered a judgment thereon. The petitioner was sentenced to Lima, as provided by law. The execution of said sentence was postponed by the trial court pending the final disposition of said cause in this court.

The Court of Appeals of the Ninth Judicial District of Ohio affirmed the judgment of the Common Pleas Court on the fourth day of April, 1955, without a written opinion. On the twentieth day of April, 1955, the petitioner filed in the Supreme Court of Ohio a motion for leave to appeal the judgment of the appellate court, alleging that the lower courts had deprived him of the rights rendered under the Constitution and further facts that the sodomy statute of Ohio did not include the act of fellatio.

It will be noted sodomy at common law does not include fellatio. There is nothing in the Ohio statute which enlarges or alters the meaning of sodomy. Fellatio was not a crime at common law. State v. Murphy, 136 La., 253, 66 So., 963-965, the court held the act of fellatio committed by the appellant was not a crime at common law. At page 965 the court quoted from Clark's Criminal Law on Sodomy:

> "* * * the act in a person's mouth is not enough; it must be per anum."
>
> "* * * it is well settled that the offense committed with the male organ and the mouth that is, the act called fellatio in medical jurisprudence, was never regarded at common law as a crime against nature, which meant only buggery or sodomy."

To the same effect are the holdings in Commonwealth v. Poindexter, 133 Ky., 720, 118 S. W., 943.

> "* * * but penetration of the mouth is not sufficient to constitute the crime (of sodomy) * * *"

People v. Schmitt, 275 Mich., 575, 267 N. W., 741:

> Syllabus 2. "At common law penetration of mouth did not constitute sodomy * * *"
>
> Syllabus 3. "Common law definition of particular crime prevails unless changed by statute."

State v. Johnson, 44 Utah, 18, 137 Pac., 632 at 633:

> "In 1 Wharton's Criminal Law (11th Ed.), Section 754, it is said: 'Sodomy proper is the carnal copulation of human beings other than natural manner: that is, against nature and per anum * * *.'"

In Russell on Crimes, 250:

> "To constitute this offense (sodomy) the act must be in that part where sodomy is usually committed. The act in a child's mouth does not constitute the offense."

2 Bishop's Criminal Law (7th Ed.), Section 1194:

> "A penetration of the mouth is not sodomy."

In State v. Forquer, 74 O. App., 293, the court pronounced the rule of interpretation as follows:

> "The statute being criminal must be construed strictly according to its clear import and not, because of the disgusting and infamous nature of the act, as it may be thought it should be."

The court further held that if the statute is to be broadened to include acts other than those stated therein "it is the province of the General Assembly and not of the courts to do so."

Petitioner submits that his conviction by the Ohio courts is based entirely on *judicial* legislation.

State v. Morrison, 96 A. 2d, 723, recognizes the two paramount principles of statutory construction in deciding a case similar to the one at bar:

> "1. Penal statutes must be strictly construed, and 2. If a change in the common law is to be effected by statute, the legislative intent to accomplish the change must be clearly and plainly expressed."

At page 728:

> "While it is not difficult to understand the tendency of some courts to strain the principles of statutory

construction in order to bring within the law of sodomy persons who engage in the revolting practice of fellatio, especially where they would otherwise have gone free from prosecution, it is more salutary to keep uppermost in mind that the proper function of courts is not to create offenses but rather to construe fairly and truly the will of legislature as it has been exercised in the penal field."

REASONS RELIED ON FOR THE ALLOWANCE FOR THE WRIT.

This case presents questions of grave importance which have not yet been passed upon by this court. The number of persons prosecuted under the Ohio Code for sodomy where the act committed is fellatio is substantial. Petitioner was charged in the indictment of having committed copulation per os or fellatio, and was convicted of sodomy. It is manifestly evident that petitioner was convicted without due process of law and in contravention of the rights guaranteed by the Fifth Amendment and the Fourteenth Amendment, Section 1 to the Federal Constitution.

The fact that the head is not a part of the "body" is advocated and fully recognized by many leading authorities.

Webster New International Dictionary:

Body: "The trunk or main part, especially of a person, animal or plant as distinguished from the limbs and the head."

Funk and Wagnalls Standard Dictionary:

Body: "The trunk or main part of an animal or thing as distinguished from the limbs and the head."

The Oxford Dictionary, Volume 1:

Body: "The main portion; the trunk—The main portion of the animal frame, to which the extremities, etc. are attached; the trunk. Opposed to the members or limbs; also to the head esp. as the seat of intelligence and guidance."

Sanchez v. The People, 22 New York Reports, 148, at page 148, Judge Wells said:

> "The indictment, in my opinion, is sufficiently certain in this respect. By the word body, in this connection, is to be understood the trunk of the man, in distinction from his head and limbs. This is the doctrine of the books on the subject."

In State v. Edmundson, 64 Mo., 398, 402, the court approved the logic of Judge Wells in Sanchez v. The People, supra, as follows:

> "The court observes that the term 'body' in such a connection, clearly means that part of the human frame to which the head and arms are attached."

We find the logic more fully expressed in Walter v. State, 34 Fla., 167, 16 So., 80, 43 American State Reports, 186:

> Syllabus 6. "In that portion of an indictment for murder stating the part of the body upon which the mortal wound was inflicted, it is sufficient to say that it was upon the body of the deceased. As thus used, the word 'body' has a well-understood ordinary meaning. It is the trunk of the human frame, distinguished from the head and limbs. It is that portion which, excluding the arms, lies between the upper part of the thighs or hips and the neck."

It will thus be observed from the above citations that many learned judges support our contention that the sodomy statute of Ohio, by its very term, does not include copulation per os, but definitely upholds our theory that such an act must be done per anum to come within the purview of the statute.

Petitioner further contends the Ohio Code Section 13043 definitely deprives him of the equal protection guaranteed by Amendments 5 and 14, Section 1 of the Federal Constitution, for the reason the said statute penalizes one who

does the copulation and absolves the other participant to the act.

It is inconceivable that such a provision does not violate the equal protection clause of the Fourteenth Amendment, Section 1 and the Fifth Amendment of the Constitution.

The crime of sodomy cannot be *committed alone*. Therefore it requires, by its very nature, at least two persons who must unite in the performance of the act. Therefore the statute must provide equal punishment for both of the parties in order to come within the purview of protection guaranteed by the Fourteenth Amendment, Section 1, and Amendment 5 to the Constitution.

This case is of great and general public interest. The Ohio courts have deprived petitioner of the rights guaranteed by the Fifth Amendment and the Fourteenth Amendment, Section 1 of the Federal Constitution, by construing the legislature's inexpressed intention in the statute instead of its expressed intention.

As indicated by many of the authorities cited above, many state courts are in conflict with the Ohio courts and the Federal Constitution under the doctrine of this case. They should, therefore, be clarified by this court, and the Supreme Court of Ohio should be overruled and the discharge of petitioner be ordered.

Wherefore, for the foregoing reasons the writ prayed for should be granted.

Respectfully submitted,

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No. 424.

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vs.

THE STATE OF OHIO,
Respondent.

June 8, 1955. Motion for leave to appeal from the Court of Appeals of Summit county. It is ordered by the court that this motion be, and the same is, overruled.

June 8, 1955. Motion by appellee to dismiss appeal as of right. It is ordered by the court that this motion be, and the same hereby is, sustained.

June 8, 1955. This cause came on to be heard upon the transcript of the record of the Court of Appeals of Summit county, upon the motion of the appellee to dismiss the appeal, filed as of right herein, and was argued by counsel.

On consideration whereof, it is ordered and adjudged that said appeal be, and the same hereby is, dismissed for the reason no debatable constitutional question is involved in said cause.

It is further ordered and adjudged that the appellee recover from the appellant its costs herein expended, taxed at $.....

Ordered, that a special mandate be sent the Court of Common Pleas of Summit county, to carry this judgment into execution.

Ordered, that a copy of this entry be certified to the clerk of the Court of Appeals of Summit county, "for entry".

June 29, 1955. Upon consideration of the application for rehearing, it is ordered by the court that rehearing be, and the same hereby is, denied.